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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1021

CHARLES A. ALFANO,

Petitioner,

vs.

THE ILLINOIS JUDICIAL INQUIRY BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT IN OPPOSITION

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JURISDICTION

The Court does not have jurisdiction under 28 U. S. C. § 1257 to entertain the Petition for the reason that the ruling below for which it seeks review is not a "final judgment or decree," as discussed more fully in Section I of the Argument.

QUESTIONS PRESENTED

Respondent disagrees with the Petition's Statement of the Questions Presented. The Questions Presented are:

1. Whether an interlocutory, no-clear-majority ruling of the Illinois Supreme Court that is subject to being modified

or rendered moot by further proceedings is a "final judgment or decree" as required for this Court's jurisdiction under 28 U. S. C. § 1257.

2. Whether the plurality decision of the Illinois Supreme Court granting an Illinois state court judge who is a defendant in a misdemeanor prosecution limited discovery of investigative materials compiled by Illinois' independent Judicial Inquiry Board (the "Board") struck a proper balance between the defendant's interest in generalized discovery and the requirement of the Illinois Constitution that the Board's investigative materials be kept confidential.

3. Whether the plurality decision of the Illinois Supreme Court erred in concluding that the Illinois Constitution's policy of confidentiality for information obtained in the investigative phase of judicial disciplinary proceedings warranted entrusting the Board with responsibility for reviewing its own materials to determine what should be produced in a pending misdemeanor prosecution against the judge under investigation by the Board.

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Illinois Constitution, Article VI, Section 3:

> The Supreme Court shall consist of seven Judges. Three shall be selected from the First Judicial District and one from each of the other Judicial Districts. Four Judges constitute a quorum and the concurrence of four is necessary for a decision. Supreme Court Judges shall select a Chief Justice from their number to serve for a term of three years.

United States Code, Title 28, Section 1257(3):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

The Statement of the Case set forth in the Petition is adequate except that it states only (Petition 5) that "There was no majority opinion of the Illinois Supreme Court," but it omits the more important fact that there was no clear majority *decision* of the Illinois Supreme Court except that the trial court had been wrong. That absence of a majority decision on any definitive substantive principle makes misleading Petitioner's statement (Petition 7):

> "The Illinois Supreme Court *held* that under *Brady* [v. *Maryland*, 373 U. S. 83 (1963)] petitioner is not entitled to all favorable evidence, but only to evidence which 'on its face, plainly negates guilt.'" (Emphasis added.)

Instead the separate opinions of the various Illinois Supreme Court Justices reflect the limited and interlocutory character of the Illinois Supreme Court's actual holding.

Six of seven Illinois Supreme Court Justices participated in the decision for which the Petition seeks review. All six agreed that the trial court order before them had been erroneously issued. They did not agree, however, as to the governing principles or as to the specific disposition that the case should be given.

Only four of the participating justices concurred in the award of the writ as granted—directing that the trial court order be vacated. The other two participating justices would merely have

directed the entry of a more narrowly drafted trial court order, and for that reason they concurred only specially.

Only three justices (Justices Underwood, Ryan and Kluczynski) joined in the plurality opinion, which concluded that the scope of required disclosure should be limited to material that "plainly on its face negates [Petitioner's] guilt" (72 Ill. 2d 238, Petition A. [hereinafter "A."] 15). Those three justices were also the only ones to conclude that the question of what material falls wtihin the scope of required disclosure should be determined solely by the Illinois Judicial Inquiry Board (the "Board") (72 Ill. 2d at 238, A. 15). Accordingly, although much is made of those matters in the Petition, there is no *decision* of the Illinois Supreme Court on either point. Illinois law requires the joinder of *four* justices to constitute a decision of its Supreme Court. See Section II of Argument.

The fourth concurring justice (Justice Clark) and the two specially concurring justices (Justice Ward and Moran) were all in essential agreement that the scope of required disclosure should generally include "any information or material in the Board's possession which tends to negate [Petitioner's] guilt or which would undermine substantially the credibility of a potential witness against the [Petitioner] at trial" (72 Ill. 2d at 241, A. 19, Clark, *J.*, concurring; see also 72 Ill. 2d at 246, A. 26, Moran, *J.*, specially concurring). Justice Clark disagreed with Justices Ward and Moran as to the specific disposition of the case only because of "the complete lack of particularity with which [Petitioner's] original demand was stated" (72 Ill. 2d at 241, A. 18). Justice Clark was therefore of the opinion that this was not "a proper case" for ordering the scope of disclosure that he would generally require (72 Ill. 2d at 241, A. 18-19).

Justices Clark and Moran further agreed with one another that the procedures for implementing Petitioner's claimed disclosure rights should include provision for judicial review (through an *in camera* inspection) in doubtful cases (72 Ill. 2d at 241,

A. 19, Clark, *J.*, concurring; 72 Ill. 2d at 248, A. 26, Moran, *J.*, specially concurring).

Justice Ward stated no opinion as to the need for judicial review, apparently being of the opinion that the issue was not then before that court (72 Ill. 2d at 244, A. 22).

ARGUMENT

Respondent respectfully submits that a Writ of Certiorari should not issue for several independent and self-sufficient reasons:

First, the decision by the Supreme Court of Illinois for which Petitioner seeks review is not a "final judgment or decree," as required for this Court's jurisdiction under 28 U. S. C. §1257. Further proceedings before the trial court in the misdemeanor prosecution against Petitioner Alfano may moot the entire controversy or substantially change the posture in which it might properly reach this Court.

In addition, from each of the relevant perspectives of the issues involved, the case as now before the Court presents no important issues of federal law that require decision by this Court.

Finally, the matters raised in the Petition were clearly decided correctly below.

I.

The Decision Below Is Not a "Final Judgment or Decree."

Of paramount importance to the Court's disposition of the Petition is the very limited nature of the holding below—an aspect of the case that Petitioner entirely misportrays in the Petition.

At most, the holding below requires vacation of an overly broad trial court production order.[1] Because there was no clear

1. See 72 Ill. 2d at 244-45, A. 22, Ward, *J.* specially concurring; 72 Ill. 2d at 247, A. 25, Moran, *J.* specially concurring. The text of the trial court order is set forth at A. 28-29.

majority decision, that holding does not decide what disclosure might be required under a more precise document request and trial court production order such as Justices Clark, Ward and Moran would collectively require (72 Ill. 2d at 241, 245 and 246, respectively; A. 18, 22 and 25, respectively). See Section II of Argument.

Moreover, even under the three-judge plurality opinion there is no way of predicting what specific materials will be disclosed[2] nor whether Petitioner might be able to establish in the course of further proceedings below a specific and compelling need for particular disclosure that he has thus far failed to establish. See Section IV of Argument.

Additionally, Petitioner's asserted due process rights will not have been violated if he should ultimately prevail on the merits of the misdemeanor prosecution that is still pending against him. *United States* v. *Agurs*, 427 U. S. 97, 108 (1976). Such a result would render moot any claim for disclosure.

In summary, there is at present a lack of finality and certainty regarding each of the following: (1) what would be produced by the Board if the trial court were to enter a new order pursuant to the plurality opinion; (2) whether the plurality opinion would be superseded by a clear majority opinion if Petitioner made a more specific document request and the trial court entered a more specific production order; (3) whether additional documents might be ordered produced if Petitioner were to demonstrate a specific and compelling need; and (4) whether Petitioner will be acquitted of the misdemeanor charge pending against him in any case.

To grant the Petition under these circumstances would be in direct conflict with the fundamental principle that a decision for which review is sought is not "final" for purposes of the

2. Petitioner has not sought production from the Board pursuant to the plurality opinion, but has instead come directly to this Court. Petitioner therefore does not know what he would receive if he were to ask for it.

jurisdictional requirement in 28 U. S. C. § 1257 if its result contemplates further proceedings that may affect the ultimate outcome of the controversy. *Gospel Army* v. *Los Angeles*, 331 U. S. 543 (1947); *Laclede Gas Light Co.* v. *Public Service Comm'n*, 304 U. S. 398 (1938); *Cincinnati Street Ry. Co.* v. *Snell*, 179 U. S. 395 (1900).

That principle has been given repeated application in circumstances, like those arising in this case, involving decisions affecting the claimed procedural rights of criminal defendants. For example in *Chapman* v. *California*, 405 U. S. 1020 (1972), this Court held that a trial court denial of a motion to suppress evidence was not final for purposes of Supreme Court review under Section 1257. *Accord, Cohen* v. *New York*, 385 U. S. 976 (1966); *Whitus* v. *Georgia*, 385 U. S. 545 (1967).

The principle has also been given repeated application in similar circumstances involving decisions that have defined the parameters of administrative authority, but have left open the specific action to be taken by the relevant administrative agency in further proceedings contemplated by the decision for which review has been sought. See, *e.g., Republic National Gas Co.* v. *Oklahoma*, 334 U. S. 62 (1948); *cf. Rochester Tel. Corp.* v. *United States*, 307 U. S. 125 (1939).

The jurisdictional requirement of finality had its genesis in important policies of judicial administration several of which are directly involved here. To forestall review until the specific impact of the decision below on Petitioner's claimed disclosure rights has been determined may avoid an unnecessary decision on constitutional issues. See *Rescue Army* v. *Los Angeles*, 331 U. S. 549, 568-69 (1947). At the very least, deferral of review would provide a factual record of what specific disclosures are made in response to the decision below and of their relationship to any specific and compelling need for disclosures that Petitioner may seek to demonstrate. *Id.*, at 573-75. In addition, deferral of review to a later date would avoid disruptive inter-

ference with Petitioner's ongoing misdemeanor prosecution. See *DiBella* v. *United States*, 369 U. S. 121, 124 (1962).

Even if the decision below were "final" under 28 U. S. C. § 1257, the furtherance of those important policies would dictate a discretionary denial of the Petition. *Rescue Army* v. *Los Angeles, supra: Naim* v. *Naim*, 350 U. S. 891 (1955). See also *Socialist Labor Party* v. *Gilligan*, 406 U. S. 583, esp. at 588 n. 2 (1972).

II.

Under Illinois Law the Decision Below Is Wholly Limited to Its Own Peculiar Facts.

Petitioner complains that the "decision" below (1) too narrowly confines the scope of required disclosure of confidential Board materials and (2) fails to establish adequate procedures for enforcing disclosure. It is crucial to note, however, that Petitioner's arguments are directed solely against the plurality views expressed in the opinion of only three members of the Illinois Supreme Court.[3]

Section 3 of Article VI of the 1970 Illinois Constitution provides in part:

> "The Supreme Court shall consist of seven Judges. . . . *Four Judges constitute a quorum and the concurrence of four is necessary for a decision.*" (Emphasis added)

Because the views expressed in the plurality opinion were joined by only three justices, those views have no precedential value. *Perlman* v. *First National Bank of Chicago*, 60 Ill. 2d 529, 331 N. E. 2d 65 (1975). Only the general *result* (holding the trial

3. No more than three justices agreed on any single resolution of either of the ultimate issues. The views expressed by Justice Clark in his concurring opinion and Justices Ward and Moran in their specially concurring opinions are all consistent with and, except for Justice Ward's failure to express any opinion as to the procedural aspects, essentially supportive of Petitioner's position as to both of the ultimate issues. Indeed, Petitioner explicitly relies on the views expressed by Justices Ward and Moran to support his arguments (Petition 7, 11, 12).

court order erroneous under the specific facts of this case) can be considered authoritative. See Black, *Handbook of Judicial Precedent* 135-36 (1912). The relevant legal principles remain undetermined by the decision. Wambaugh, *The Study of Cases* 50 (2d ed. 1894); *Alaska* v. *Troy*, 258 U. S. 101, 111 (1922). See *Miller* v. *California*, 413 U. S. 15, 22 n. 3 (1973), questioning the former authority of the earlier plurality standard for determining obscenity cases set forth in *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966); cf. *Redrup* v. *New York*, 386 U. S. 767, 770-71 (1967).

Thus the actual decision below could have no future relevance except in the remote possibility that another case might arise on the same precise facts. That factor alone vitiates the importance of this case as incorrectly characterized by Petitioner and justifies a denial of certiorari.

Moreover, as the remaining Sections of this Brief demonstrate, even were the plurality opinion considered (as it is not) a definitive decision, there would be several additional bases (discussed below) for non-review by this Court.

III.

The Petition Misstates the Impact That the Dictum in the Plurality Opinion Below Would Have on Brady v. Maryland.

To the contrary of the statement in the Petition's Reasons for Granting the Writ (Petition 7), even the dictum in the plurality opinion does not express an "unprecedented interpretation" of "this Court's decision in *Brady* v. *Maryland*, 373 U. S. 83 (1963)" having "far reaching consequences." Indeed, the plurality opinion does not purport to rely directly on *any* interpretation of *Brady*.

Instead, the plurality specifically recognizes the "unique nature" of this case, involving as it does materials (1) that are held by an agency of the state that is constitutionally created and

totally autonomous from the prosecution and (2) to which the prosecutor does not even have access (72 Ill. 2d at 233-34, 235-36, A. 11-12, 12-13). Those facts distinguish this case from the typical *Brady* situation, which involves materials "in the prosecutor's possession" or in the possession of "governmental agencies more closely related to the prosecuting agency" (72 Ill. 2d 233-34, 237, A. 11-12, 14).

The plurality opinion also recognized another and perhaps more fundamental distinction between this case and the typical *Brady* situation. In this case the criminal defendant's interest in access to the confidential materials comes into direct conflict with a compelling public interest in encouraging witnesses to come forth with information before the body responsible for initiating judicial disciplinary proceedings (72 Ill. 2d at 230, 231-33, A. 6, 8-10). This Court's own opinions since *Brady*, in dealing with similar issues of confidentiality, have scrupulously avoided any reference to *Brady* that would have given the decision in *Brady* controlling impact. See, *e.g.*, *Dennis* v. *United States*, 384 U. S. 855 (1966) (review of ruling on motion for production of secret grand jury testimony); *cf. Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395, 398 (1959) (similarly holding the production required under *Jencks* v. *United States*, 353 U. S. 657 (1957), inapplicable to a request for secret grand jury minutes).

Contrary to Petitioner's assertion (Petition 11), nowhere did the plurality even suggest that they considered *Brady* determinative of Petitioner's claims. They explicitly stated that they "regard[ed] the holding and discussion in [*United States* v.] *Nixon* [418 U. S. 683 (1974)] as dispositive of" the due process issues raised (72 Ill. 2d at 237, A. 14). At most, the plurality merely analogized to "the due process *philosophy* underlying *Brady*" (72 Ill. 2d at 238, A. 15) in a far-removed context.[4]

4. The reference in the plurality opinion (72 Ill. 2d at 234, A. 10) to *People* v. *Schmidt*, 56 Ill. 2d 572, 309 N. E. 2d 557 (1974), most clearly was not an attempt "to justify" an erosion of

(Footnote continued on next page.)

Because it does not even purport to represent a direct application of *Brady*, as such, the plurality opinion can hardly be viewed as Petitioner would characterize it—a "far reaching" attempt to "seriously undermine" the principles enunciated in *Brady* (See Petition 7). It represents no future threat to proper results in the more frequently recurring *Brady* type of situation.[5]

IV.

Petitioner Has No Due Process Right to the Compelled Disclosure He Seeks.

Petitioner's substantive claim is based on his erroneous premise "that a criminal defendant is entitled to every person's evidence" (Petition 9). Not so; the law is replete with common law, statutory and constitutional privileges that curtail and often totally preclude a criminal defendant's access to potentially relevant evidence. Examples include the attorney-client privilege, the husband-wife privilege, the doctor-patient privilege, the priest-penitent privilege, the newsman's privilege as to source (statutorily created in a number of states), the grand jury secrecy requirement, the informer's privilege and executive privilege.

Article VI, § 15(c) of the 1970 Illinois Constitution establishes an unambiguous and strict prohibition against disclosure

(Footnote continued from preceding page.)

the *Brady* principle (in the context of misdemeanor cases). The dictum in *Schmidt affirmed* the applicability of the *Brady* principle to misdemeanor cases as well as felony cases. The plurality opinion merely referred to the holding in *Schmidt* that the Illinois *criminal discovery rules* do not apply in misdemeanor cases like Petitioner's. That reference was in response to Petitioner's argument (not based on *Brady*) that Illinois Supreme Court Rule 412(g), Ill. Rev. Stat. ch. 110A, § 412(g), might statutorily require the disclosure sought.

5. Quite apart from the fact that the conclusion in the plurality opinion does not even purport to rest on a direct interpretation of *Brady* (limiting or otherwise), we note that this Court has itself cast doubt on the former breadth of *Brady* and its more immediate progeny by the very limited scope of required disclosure discussed in *United States* v. *Agurs*, 427 U. S. 97 (1976).

of information and materials acquired by the Board in the process of investigating alleged judicial misconduct, as the plurality opinion confirmed (72 Ill. 2d at 230, A. 6). That confidentiality requirement, though obviously intended to protect judges under investigation, serves also to protect complainants, witnesses and other participants in Board proceedings by "providing protection against possible retaliation and recrimination" (72 Ill. 2d at 230, 231-33, A. 6, 8-10). It thus facilitates the ability of the Board to carry out its own constitutional duties by "encourag[ing] the willing participation of relevant witnesses" (*Id.*). The plurality recognized the compelling nature of those important public interests embodied in the state constitutional mandate (*Id.*). This Court itself has recently referred to the almost total uniformity (with the one exception of Puerto Rico) with which confidentiality requirements are incorporated into the judicial disciplinary systems established in 49 jurisdictions and the importance of the same public interests served by confidentiality. *Landmark Communications, Inc.* v. *Virginia,* 435 U. S. 829, 834-36 (1978).

To the extent the confidentiality requirement protects complainants and witnesses it establishes, in effect, a privilege on their behalf against disclosure of their identities and their confidential communications made to the Board. In that respect the prohibition is an Illinois constitutional affirmation and particularized amplification of the more general common law privilege (the "informer's privilege") as to the identity of persons providing confidential information to government law enforcement officials. See *Scher* v. *United States,* 305 U. S. 251 (1938). Moreover, the confidentiality that attaches to Board proceedings and materials is strongly analogous to the secrecy requirement applicable to grand jury proceedings.[6] See discus-

6. In the two-tiered Illinois judicial disciplinary system the Board's function is directly analogous to that of a grand jury in a criminal proceeding. Under Article VI, § 15(c) of the 1970 Illinois Constitution, the Board is responsible for determining by vote on the basis of investigative materials and the sworn testimony of witnesses before it whether "a reasonable basis exists" to bring charges against a judge before the Courts Commission, which tries such matters.

sion in *United States* v. *Procter & Gamble,* 356 U. S. 677, 681 n. 6 (1958); *Smith* v. *United States,* 423 U. S. 1303 (1975); *Pittsburgh Plate Glass Co.* v. *United States,* 360 U. S. 395 (1959). The plurality opinion recognizes and relies on those analogies in its analysis (72 Ill. 2d at 230-31, 235, A. 7, 11-12).

In any event, disclosure (even to a court *in camera*) should not be required absent a demonstration by the person seeking access to Board materials of a *compelling and specific need* for such disclosure. That has been this Court's approach in other but similar circumstances involving requests for disclosure of information having limited confidentiality. See, *e.g., Roviaro* v. *United States,* 353 U. S. 53 (1957) (need sufficiently demonstrated to overcome informer's privilege); *Pittsburgh Plate Glass Co.* v. *United States,* 360 U. S. 395 (1959) (grand jury secrecy not overcome); *United States* v. *Nixon,* 418 U. S. 683 (1974) (need sufficiently demonstrated to overcome executive privilege). The decision in *In re Farber,* 78 N. J. 259, 394 A. 2d 330, 338 (1978), *cert. denied* ..... U. S. ..... (Nov. 28, 1978), relied on by Petitioner, makes that point equally clear in the context of a state statute establishing a newsman's privilege as to source.

In our case the plurality opinion interpreted the Illinois constitutional requirement of Board confidentiality as embodying public interests—as a matter of Illinois law—that are even more compelling than those embodied in the grand jury secrecy requirement and the informer's privilege, and from that concluded that a stronger showing of need would be required to displace Board confidentiality (72 Ill. 2d 230, 231-32, 235, A. 6, 8, 11-12). Quoting from Petitioner's trial court application for compelled disclosure, the plurality noted (72 Ill. 2d at 234-35, A. 11):

> Production is sought on the basis of [Petitioner's] assertion, apparently *unsupported by testimony or affidavit,* that an unidentified investigator for the Board has questioned "sub-

> stantially all of the witnesses [unidentified] including several [unidentified] who have refused to submit to interrogation by [Petitioner]." It is further asserted that the unidentified investigator "has from time to time revealed to witnesses [unidentified] friendly to defendant the substance [unexplained] of what other witnesses [unidentified] have stated," and that conflicting statements of unidentified witnesses adverse to [Petitioner] have been revealed. (Bracketed material in original; emphasis added.)

Expressing severe criticism of Petitioner's reliance on such conclusory and unverified assertions derived from "triple hearsay" statements "by unidentified persons" as the basis for his claim, the plurality concluded that his disclosure demand "is merely rummaging . . . for exculpatory scraps" (72 Ill. 2d at 235, A. 11-12).[7] The plurality had noted earlier (72 Ill. 2d at 231, A. 8) that secret grand jury materials are simply not subject to court-compelled disclosure for the purpose of pretrial discovery in a pending criminal case and considered that the same should hold true as to confidential Board materials. See, *e.g.*, *United States* v. *Tager*, 481 F. 2d 97 (10th Cir. 1973), *cert. denied* 415 U. S. 914, *reh. denied* 416 U. S. 952 (1974); *United States* v. *Cole*, 449 F. 2d 194 (8th Cir. 1971), *cert. denied* 405 U. S. 931 (1972).

Petitioner's vague assertions regarding speculative possibilities clearly do not establish a specific need for any disclosure, much less the broad-scale disclosure (virtually all of the Board's investigative materials in the matter) that Petitioner's application to the trial court sought. *United States* v. *Alvarez*, 472 F. 2d 111, 113 (9th Cir. 1973), and cases cited therein; *Lannom* v. *United States*, 381 F. 2d 858, 861 (9th Cir. 1967). At the very least, the lack of evidentiary support for Petitioner's vague, unverified assertions constitutes a failure of proof to establish his claim.

7. Petitioner's statement (Petition 10 n. 1) that it would be "impossible" for him to present greater detail is specious in light of his acknowledgments in his trial court application, which reflects his acknowledged information as to the *substance* of the alleged conflicting statements, the *identity* of his "friendly" witness and knowledge as to the identities of other relevant witnesses.

Both from Petitioner's very presence at the occurrence giving rise to the misdemeanor charges and from his agreement with the prosecution to abide by the Illinois criminal discovery rules as to discovery in felony cases (see trial court Memorandum Opinion, A. 31), Petitioner's information as to the identity of occurrence witnesses is at least equal to that available to the Board. There is no hint, let alone evidence, to the contrary. Petitioner's assertions as to the unwillingness of some witnesses to cooperate with him (unsupported by testimony or affidavit) wholly ignores the availability of judicial process to elicit the relevant information. The fact that it may simply be more convenient to Petitioner to use the Board's materials does not establish a *compelling* need. *Smith* v. *United States*, 423 U. S. 1303, 1304 (1975).

Any suggestion by Petitioner that his need for disclosure is compelling because nondisclosure would, in his view, deprive him of a fair trial (see Petition 12) altogether misses the point that the demonstration of a compelling need is a *prerequisite* to required disclosure where a strong competing public interest in confidentiality is also involved. Unless Petitioner can *first* establish such compelling need, by definition nondisclosure does not affect his right to a fair trial.

V.

Petitioner Has No Constitutional Right to an In Camera Inspection.

Petitioner's argument in his Section III assumes that all controversies are necessarily subject to judicial determination. That simply is not the case. In *Briscoe* v. *Bell*, 432 U. S. 404 (1977), this Court recently held that the United States Attorney General's determination that a state is covered by the Voting Rights Act of 1965, having been declared "final" by Congress, is not subject to judicial review, at least as to the factual basis for such determination. See also *Shaughnessy* v. *United States*,

345 U. S. 206 (1953) (decision by Attorney General to exclude alien on grounds of national security held final and nonreviewable); *Ludecke* v. *Watkins*, 335 U. S. 160 (1948) (Presidential determinations of when a "state of war" has ceased to exist and, in an immediate post-war period, of whether enemy aliens should be deported held final and nonreviewable); *Powell* v. *McCormack*, 395 U. S. 486, 521 n. 42 (1969) (whether federal courts are barred from reviewing factual determination by Congress that one of its members should be expelled based on judicially defined legal criteria held an open question).

In this case, the plurality interpreted the confidentiality provision in Article VI, § 15(c) of the 1970 Illinois Constitution, as a matter of state law, to limit the court's role to defining the general standard to be applied by the Board in deciding what Board materials should be disclosed. Under the plurality interpretation of the Illinois constitution, the application of that standard in individual circumstances has been delegated to the Board on a final and non-reviewable basis.[8] The validity of that distribution of decision-making authority (pursuant to the Illinois Constitution) is no more repugnant to the United States Constitution than are the distributions of decision-making authority considered in the cases referred to in the preceding paragraph. It is no more subject to challenge here than the distribution of subject matter jurisdiction within the Illinois judicial system would be. See *Herb* v. *Pitcairn*, 324 U. S. 117, 121-22 (1945). The Board is, after all, like a court, a public

8. That interpretation of the Illinois constitutional provision, being a matter of state law, is not subject to review here. *Herb* v. *Pitcairn*, 324 U. S. 117 (1945); *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 557 (1940). Petitioner's implication (Petition 14-15) that such interpretation is not consistent with the decision in *People ex rel. Harrod* v. *Illinois Courts Commission*, 69 Ill. 2d 445, 372 N. E. 2d 53 (1977), is wholly beside the mark. Petitioner misreads the scope of *Harrod;* but even if there were such inconsistency, reconciliation of the plurality opinion with the decision in *Harrod* is again a matter of state law for determination by the Illinois courts.

body charged with responsibility to perform faithfully its constitutionally-mandated functions.[9]

Petitioner's reference to several authorities discussing the concept of judical review generally (Petition 13-15) is of little aid in resolving the issue in this case. There is no question that courts generally have implied authority to determine whether action taken by a coordinate branch of government is authorized by statute or constitution. But as the cases referred to in this Section V demonstrate, such implication is not the universal rule. It is clearly constitutional to limit judicial review in particular circumstances—and such limitations render the controversy nonjusticiable. The plurality opinion interprets the confidentiality provision in Article VI, § 15(c) of the 1970 Illinois Constitution as establishing just such a limitation: It bars court review of the Board's application of the judicially-defined general standard for disclosure of its confidential materials.

In *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829 (1978), this Court inquired independently into whether the publication of information regarding confidential judicial disciplinary proceedings constitutes a clear and present danger to the integrity of such proceedings sufficient to justify general prohibition. The plurality opinion has made a similar judicial inquiry: whether the public interest in the confidentiality of Board proceedings is sufficiently compelling to justify an absolute prohibition against their disclosure upon request by a criminal defendant for use in his defense of the criminal proceeding. The plurality has expressed its view that an absolute prohibition is inappropriate. However, the plurality has concluded that only a limited disclosure, within specifically defined parameters, should be made. Thus the judicial balancing of interests is already an accomplished fact under the plurality approach. All that

9. Petitioner's suggestion (Petition 16-17) that the inclusion of four non-lawyers in the Board's nine-person membership somehow affects its ability to make the determination allocated to it under the Illinois constitutional provision does not rise to federal constitutional proportions. See *North* v. *Russell*, 427 U. S. 328 (1976).

remains to be done is for the Board to apply the standard announced.[10]

CONCLUSION

For the foregoing reasons, any one of which should suffice, Respondent respectfully submits that the Petitioner for a writ of certiorari should be denied.

Respectfully submitted,

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10. None of the other cases relied on by Petitioner (Petition 15-16) even purport to establish a federal constitutional right to an *in camera* inspection of confidential materials.